80-820

Supreme Court, U. S.
FILED
NOV 19 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

November Term

No. _____

JERRY L. MANKA, BARBARA R. MANKA, and RICKY A. MANKA,

Petitioners,

vs.

JERRY D. MARTIN, RODNEY SIMMONS, RICHARD HEWITT, E. L. POST, T. V. MIDDLE, C. F. JEFFERS, L. C. HOEFFER, FRANK T. BECKWITH, ROLAND J. BRUMBAUGH, ALAN CHARNES, and JOSEPH F. DOLAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

JERRY R. MANKA
BARBARA R. MANKA
RICKY A. MANKA
Petitioners, Pro Se
1321 Northview Drive
Colorado Springs, CO 80909
PH: 303-635-0138

In the
Supreme Court of the United States

November Term

No. _____

JERRY L. MANKA, BARBARA R. MANKA, and RICKY A. MANKA,

Petitioners,

vs.

JERRY D. MARTIN, RODNEY SIMMONS, RICHARD HEWITT, E. L. POST, T. V. MIDDLE, C. F. JEFFERS, L. C. HOEFFER, FRANK T. BECKWITH, ROLAND J. BRUMBAUGH, ALAN CHARNES, and JOSEPH F. DOLAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF COLORADO

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioners have been effectively denied their rights under the United States Constitution, when the State of Colorado seized property *without* the required due process of law, in that the State seized property which was not identified or described on any warrant for distraint and *NO* court order, or oath or affirmations.

Whether the State failed to follow some of the required provisions of Colorado Revised Statute 39-21-114, authorizing any such seizure.

Whether the Petitioners have been effectively denied their RIGHTS under the Constitution of the United States as to Judicial Review, when the Colorado District Court avoided *ALL* the real questions of the case.

Whether the Petitioners have been denied their rights under the Constitution of the United States, when the Colorado Supreme Court treats them differently than the Supreme Court admits it would have treated recognized members of the Bar.

The Petitioners pray a Writ of Certiorari issue to review the judgment of the Colorado Supreme Court, entered on July 21, 1980. Final Post Trial Order issued August 22, 1980.

INDEX

Questions Presented for Review 2

Citations to Opinions Below 4

Jurisdiction 4

Statement of the Case 4

Reasons for Granting the Writ 5

Conclusion 7

Appendix A:
Opinion of the Colorado Supreme Court 8

Appendix B:
Decisions of Colorado District Court for the 4th Judicial District for El Paso County (5 cases) 17

CITATIONS

Colorado Revised Statute 39-21-114 ..... 2, 7

United States Constitution, Fourth Amendment 5

Leiberhard v. Department of Revenue, 123 Colo. 369, 229 P.2d 655 (1951) 6

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Colorado in Case No. 80 SA 46, is set out in Appendix "A" at page 11. The decision of the Colorado District Court for the 4th Judicial District for El Paso County in Case Nos. 95403, 95470, 95490, 95791 and 95554, are set out in Appendix "B", at page 10.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257. Final order of Colorado Supreme Court Aug. 22, 1980.

STATEMENT OF THE CASE

The Petitioners were, at the time of the filing of the original cause of action, owners, operators, and employees of a small recreation vehicle business in Colorado Springs, Colorado.

The Respondents in the case apparently became very angry at the Petitioners for sending their letter complaining about the Respondents, to the Governor of Colorado. That letter was sent during the month of August, 1978. Respondents conducted an unprecedented seven year audit upon the books and records of the Petitioners, with the full cooperation, help and assistance of the Petitioners, Jerry and Barbara Manka.

That on or about January 27, 1976, Respondents mailed to the Petitioners, a "Notice of Deficiency", demanding approximately $10,000.00 in back taxes and penalties.

That the amount of the alleged taxes was unreasonable, and this assessment was arbitrary. The Petitioners sent a notice to the Respondents declaring same.

That on or about February 27, 1976, the Respondents sent the Petitioners a Demand for Payment, but failed thereafter, to timely respond to *any* communications from the Petitioners.

That on or about April 19, 1976, the Respondents seized, without due process, the building, business, new and used motorcycle inventory, and new and used parts inventory, with

NO process whatsoever, except color of law. *NONE* of the above was identified or described on a warrant or court order.

That contrary to statutes, the Respondents attempted to sell the seized property of the Petitioners, with *NO* notification, as required by statute, of the sale. Respondents failed and refused to state or notify the Petitioners of any anticipated sale, and additionally, were anticipating the sale of thousands of dollars worth of *NEW* motorcycles, which were floor planned, and *FULLY* mortgaged, without Notice to the lienholders.

That Colorado statutes forbid the sale of floor planned mortgaged merchandise for satisfaction of income taxes.

That Petitioners paid the fraudulent assessment in lieu of losing all their assets.

That on or about June 14, 1976, Petitioners had to pay the Respondents ransom to reclaim their property.

That on or about April 6, 1977, after a third audit, Respondents refunded *all* of the money collected as alleged taxes, proving that the arbitrary assessment was false, arbitrary, and erroneous.

That the District Court of Colorado failed to address itself to any question of unlawful seizure, denial of due process, or denial of equal protection of the law.

That the Colorado Supreme Court failed to address any issue posed by the Appellants, and by their own admission, clearly discriminated against the *Pro Se* Petitioners for being *Pro Se*.

REASONS FOR GRANTING THE WRIT

I.

THE RESPONDENTS' ACTIONS DENIED PETITIONERS THEIR RIGHTS SECURED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Petitioners' business, inventory, and building, were seized without a warrant, in direct violation of the Fourth Amendment, under color of law.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendment IV, United States Constitution.

To allow the State, the Respondents, to operate under COLOR OF LAW in seizures, effectively denies the citizen of those Constitutional rights.

II.

THERE IS A DENIAL OF DUE PROCESS WHEN THE CITIZEN MUST PAY MONEY, NOT DUE, TO SECURE RELEASE OF PROPERTY UNLAWFULLY SEIZED.

To secure the return of their property, Petitioners were forced to pay money (ransom) on the inventory and building, which had been seized without a Warrant for Distraint or Court Order.

III.

THE CONSTITUTION OF THE UNITED STATES GUARANTEES A CITIZEN THE OPPORTUNITY FOR HIS GRIEVANCES TO BE FULLY AIRED, AND ALL THE FACTS HEARD BY A JURY.

A Summary Judgment by a lower court, on the strength of a 1952 case, *Leiberhard v. Department of Revenue,* 123 Colo. 369, 229 P.2d 655 (1951), which is in effect being challenged at this time, in effect denies the Petitioners to their right to due process, and to the protection of the Constitution. *NO* appeal is afforded the taxpayer to any higher level of authority. That the appeal procedure, as supported in *Leiberhard,* supra, fails to offer *ANY* speedy or simple remedy. The appeal offered in the statute is a hoax as a taxpayer can ONLY appeal to the same person from whom the original jurisdiction was issued. The statute offers *NO* appeal at any higher level of authority.

IV.

ACTS OF THE STATE WHICH ARE NOT DONE PURSUANT TO THE CONSTITUTION OF THE UNITED STATES, AND WHICH DENY THE CITIZEN ALL HIS RIGHTS, ARE NULL AND VOID.

The assessment, seizure and collection was arbitrary and capricious; handled by incompetents who failed to recognize any of the provisions of Colorado Revised Statute 39-21-114, and many others.

CONCLUSION

For the reasons stated herein, the Petitioners respectfully pray this Honorable Court will grant the Writ to the Supreme Court of the State of Colorado.

RESPECTFULLY SUBMITTED this _____ day of November, 1980.

JERRY L. MANKA

BARBARA R. MANKA

RICKY A. MANKA

Petitioners, Pro Se
1321 Northview Drive
Colorado Springs, Colorado
Colorado Springs, Colorado 80909
PH: 303-655-0138

APPENDIX "A"

IN THE SUPREME COURT OF COLORADO

NO. 80SA46

JERRY L. MANKA, BARBARA R. MANKA, and RICKY A. MANKA,	)	
Plaintiffs-Appellants,	)	
v.	)	
JERRY D. MARTIN, RODNEY SIMMONS, RICHARD HEWITT, E. L. POST, T. V. MIDDLE, C. F. JEFFERS, L. C. HOEFFER, FRANK T. BECKWITH, ROLAND J. BRUMBAUGH, ALAN CHARNES, and JOSEPH F. DOLAN,	)	JULY 21, 1980
Defendants-Appellees.	)	

Appeal from the District Court of El Paso County

Honorable Hunter D. Hardeman, Judge

EN BANC JUDGMENTS AFFIRMED

Jerry L. Manka, Barbara R. Manka,
and Ricky A. Manka,

Pro Se.

J. D. MacFarlane, Attorney General,
Richard F. Hennessey, Deputy Attorney General,
Mary J. Mullarkey, Solicitor General,
Billy Shuman, Assistant Attorney General,

Yegge, Hall & Evans,
Carol M. Welch,

Attorneys for Defendants-Appellees.

JUSTICE LEE delivered the opinion of the Court.

This appeal [1] is from summary judgments entered in favor of appellees, the Colorado Department of Revenue and certain named agents, in five cased filed in August and September 1977 in the District Court of El Paso County by appellants, Jerry L., Barbara R., and Ricky Manka. We affirm.

The actions arose from the levying and collection of sales, use, and income taxes by the Colorado Department of Revenue (the Department) in 1976 from appellants, individually and under the business names of Central Cycle Shoppe and Track and Wheel Equipment Company.[2] In March 1978, on the motion of the appellees, the district court consolidated the cases into No. 95403. The trial date was set for August 1979.

---

[1]Although appellants filed their appeal in the court of appeals, because in their briefs they challenged the constitutionality of certain state statutes, the court of appeals requested that this court determine the proper jurisdiction. We ordered the appeal transferred to this court pursuant to section 13-4-102, C.R.S. 1973.

[2]The summary judgment order contained a brief description of each complaint. We here summarize the descriptions.

The appellants Jerry L. and Barbara R. Manka brought the following actions against appellees:

In No. 95403, plaintiffs sought damages arising from action of appellees in refusing to refund $1,014.23 in taxes which appellants paid under protest.

In No. 95470, plaintiffs sought damages arising from actions of the appellees in seizing and holding their automobile. This action is apparently based on unlawful seizure and negligence.

In No. 95490, plaintiffs sought relief from, and compensation for damages arising from, an allegedly fraudulent and unlawful audit by appellee Jeffers.

In No. 95491, plaintiffs sought damages arising from actions of appellees in allegedly unlawfully seizing their pickup truck.

All three appellants in No. 95554 sought damages arising from an allegedly illegal seizure of their personal property. This is the only suit in which appellant Ricky A. Manka is named as plaintiff.

On July 31, 1979, the district court granted summary judgment in favor of appellees in three of the cases (Nos. 95490, 95491, and 95554).

The court also granted partial summary judgment to appellees in the remaining two cases. The partial summary judgment limited appellants' possible recovery in No. 95403 to the amount of the refund allegedly due, plus interest, and, in No. 95470, to the market value plus interest of any automobile parts proven to have been lost from the automobile due to appellees' conduct. These two cases remained consolidated and were tried to a jury in August 1979. The jury returned a verdict in favor of the appellees in No. 95470 and in favor of the appellants in No. 95403 in the amount of $535.62. Appellants failed to file any motion pursuant to C.R.C.P. 59 for a new trial or an amended judgment. They did, however, timely file a notice of appeal from the summary judgments.

The record before this court does not contain any direction by the district court that the partial summary judgment granted to the appellees in cases Nos. 95403 and 95470 be made a final judgment for purposes of appeal. C.R.C.P. 54(b).

The issues on appeal may be stated as follows: (1) whether sections 39-22-601 *et seq.* and sections 39-21-103, 104, 105, 113, and 114, C.R.S. 1973, are unconstitutional; and (2) whether the trial court erred in granting appellees' motion for summary judgments in Nos. 95490, 95491 and 95554; erred in granting appellees' motion for partial summary judgment in Nos. 95403 and 95470; and erred in denying appellants' motion for summary judgment in all five cases.

I.

Appellants raise as an issue on appeal the constitutionality of the various statutes, all of which relate to the procedures to be followed concerning tax claims and the administration of the Colorado Department of Revenue.

Having carefully examined the record, and, in particular, the complaints, we can find no indication that the constitutionality of any of these statutes was raised as an issue at the trial level. Questioning the constitutionality of a statute for the first time in an appellate brief will not successfully raise the

issue for review by this court of appeal. *Hessling v. Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *Johnson v. People*, 96 Colo. 175, 40 P.2d 615 (1935); *Loan Company v. Ira*, 75 Colo. 379, 226 P. 136 (1924). We find no reason to depart from this rule in this appeal.

Appellants claim that they believed they were identifying the issue at the trial level by citing 42 U.S.C. 1983 in their complaints. A mere recitation of 42 U.S.C. 1983, a federal statute recognizing a cause of action in a citizen of the United States arising from a deprivation of constitutional rights, is not sufficient to identify as an issue the constitutionality of particular Colorado statutes.

II.

We next consider appellants' claim that the trial court erred in granting summary judgments in favor of appellee.

(A) Actions Nos. 95403 and 95470

As indicated above, the trial court granted partial summary judgments in actions Nos. 95403 and 95470. In doing so, the court ruled that, as a matter of law, appellees prevailed except as to appellants' claim for a refund and for reimbursement for the value of the missing auto parts. In neither of these cases was the action terminated by the order of partial summary judgment.

When a summary judgment disposes of less than the entire action, the judgment is not final unless the trial court expressly determines that there is no just reason for delay and directs the entry of a final judgment. C.R.C.P. 54(b). If a trial court does not make such a determination, the court's decision "shall not terminate the action as to any of the claims * * *." C.R.C.P. 54(b). Because partial summary judgments in actions Nos. 95403 and 95470 were not final judgments, they are not appealable. The rights and liabilities of the parties remain yet to be determined. *Stillings v. Davis*, 158 Colo. 308, 406 P.2d 337 (1965).

Furthermore, after these two cases were tried and the parties' rights and obligations were determined, appellants

could have, and indeed should have, moved for a new trial or an altered or amended judgment under C.R.C.P. 59. Because they did not timely file such motions and allow the trial court an opportunity to review its possible errors, appellants are now barred on appeal from asserting error by the trial court. *Rueckhaus v. Snow*, 167 Colo. 51, 445 P.2d 577 (1968).

We dismiss the appeal from the partial summary judgments in actions Nos. 95403 and 95470.

(B) Action No. 95490

The district court in its summary judgment order took judicial notice of a 1976 civil action, *Manka v. Martin*, Civil Action No. 92349, and ruled that the decision there barred the instant action under the doctrine of res judicata. We agree with that ruling.

In the earlier action (No. 92349), Jerry L. and Barbara R. Manka had sought and received a temporary restraining order from the El Paso County District Court against the Department and, specifically, against Jerry Martin, a collection and enforcement agent, and Joseph F. Dolan, the Director of the Department. The order prohibited further seizure and holdings of the Mankas' property. It was based upon their allegations that the value of the properly already seized by the Department exceeded the amount of their tax deficiency, and that the assessment of the tax deficiencies was unlawful. Following a hearing, the trial court vacated the temporary restraining order and denied the request for relief in the nature of mandamus and permanent injunction. The court did so because it found that, contrary to the assertions of the Mankas, they had failed to follow the proper administrative appeal procedure by requesting a hearing pursuant to section 39-21-103, C.R.S. 1973, as set forth in the notices of deficiency which they had received.[3] No timely appeal was taken from the ruling in that action.

---

[3]A taxpayer's failure to pursue the proper administrative courses available to him as possible remedies bars him from later attacking the final determination and notice of tax deficiency. *Leibhardt v. Revenue Department*, 123 Colo. 369, 229 P.2d 655 (1951).

The district court also noted that the complaint in action No. 95490 was based upon the same alleged facts as in the 1976 complaint (No. 92349) and that the causes of action in both cases were identical, *viz.*, an alleged wrongful audit.[4] Based upon these identities of fact and claims, the district court ruled that the present action must be dismissed under the doctrine of res judicata.

In *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973), this court discussed the doctrine of res judicata.

> "* * * The doctrine holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. It bars relitigation not only of all issues actually decided, but of all issues that might have been decided. It requires an identity of parties or their privies (*Restatement, Judgments* §§ 83-92 (1942)), as it would be unfair to preclude a party from litigating an issue merely because he could have litigated it against a different party."

It is not significant that the named defendants in the instant case include individual agents and employees of the Department not named in the earlier case. The doctrine of res judicata does not require that all parties to the previous suit be parties to the subsequent suit, and vice versa, but only that the party against whom the doctrine is asserted have been a party or in privity with a party to the prior adjudication on the same claim. *Pomeroy v. Waitkus, supra; Murphy v. No. Colo. Grain*, 30 Colo. App. 21, 488 P.2d 103 (1971).

Jerry L. and Barbara R. Manka were plaintiffs in both cases Nos. 92349 and 95494. The alleged causes of action in each were identical. The court in No. 92349 decided the issue of

---

[4]The only factual difference between the two actions is that one distraint warrant complained of in the instant case was issued after the temporary restraining order was vacated in the earlier case. However, since the same facts served as the basis for the issue of all the distraint warrants, we agree with the trial court that this factual difference is of no consequence to the present issue.

a wrongful audit against them. They are therefore barred under the doctrine of res judicata from relitigating the issue in this case. Summary judgment was properly ordered in case No. 95490.

(C) Action No. 95491

In this action, appellants apparently allege that the Department's seizure of their pickup truck from the public streets on June 11, 1976, was unlawful. The allegations in their complaint, and amendments to the complaint, are far from clear. The district court in its summary judgment order summarized appellants' argument as asserting that the distraint warrant was "not directed toward it [the truck]." To the extent that the Mankas are arguing that the Department lacked authority to assess their tax liability and to pursue collection procedures by seizing the truck, we refer to part II(B) of this opinion and hold that the doctrine of res judicata supports the district court's grant of summary judgment against appellants.

To the extent that appellants are arguing that the seizure of the truck was invalid as a violation of the Fourth Amendment of the United States Constitution, we do not agree. It is plain that warrantless seizures of automobiles from public streets by tax enforcement authorities are not violative of the Fourth Amendment. *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L.Ed.2d 530 (1977). Consequently, even if the distraint warrant were "not directed toward" the truck, the fact is immaterial to the legality of the seizure.

Appellants cite numerous other provisions of the United States Constitution which they claim have been violated by the Department's seizure of their property. We can find no merit to these arguments.

We affirm the district court's summary judgment in favor of appellees in action No. 95491.

(D) Action No. 95554

All three appellants were plaintiffs in this action. They claimed that seizure of a Dodge truck and other personal property by the Department, on April 19, 1976, was unlawful.

Appellants argue on appeal that the illegality resulted from (1) seizure of property belonging to Ricky A. Manka pursuant to warrants concerning Jerry and Barbara Manka, and vice versa, and (2) the Department's failure to establish ownership of the seized property.

The district court found, on the basis of the pleading, that all assets of the businesses were owned by Jerry L. and Barbara Manka, and that Ricky Manka, as holder of a sales tax license for one of the businesses, was at most a nominal plaintiff. Indeed, there are no allegations in the complaint or amendments that Ricky Manka was the owner of the property seized pursuant to distraint warrants issued in the names of Jerry and Barbara Manka. Neither is there any support offered for the argument that the Department's seizure of the property was unlawful because the Department failed to establish the ownership of the property seized. Rather, the pleadings are replete with conclusionary statements and devoid of factual allegations necessary to a successful statement of a claim for relief.

Because appellants have not presented any discernibly meritorious argument concerning the unlawfulness of the seizures, and because we see no genuine issue as to any material fact, we affirm the district court's summary judgment dismissing action No. 95554.

In conclusion, we note that appellants elected to proceed pro se both at the trial and appellate level. We repeat what we have said in similar circumstances:

> "* * * A litigant is permitted to present his own case, but, in so doing, should be restricted to the same rules of * * * procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded." *Knapp v. Fleming*, 127 Colo. 414, 258 P.2d 489 (1953).
>
> "* * * If a litigant, for whatever reason, sees fit to rely upon his own understanding of legal principles and the procedures involved in the courts, he must be prepared to accept the consequences of his mistakes and errors. * * *" *Viles v. Scofield*, 128 Colo. 185, 261 P.2d 148 (1953).

The appeal from the partial summary judgments in actions Nos. 95403 and 95470 is dismissed.

The judgments are affirmed in actions Nos. 95490, 95491, and 95554.

JUSTICE ERICKSON and JUSTICE DUBOFSKY do not participate.

APPENDIX "B"

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF EL PASO AND STATE OF COLORADO

Civil Action Nos. 95403, 95470, 95490

94591 and 95554

Division No. 6

JERRY LEE MANKA, BARBARA RUTH MANKA and RICKY ALAN MANKA,	)	
Plaintiffs,	)	SUMMARY JUDGMENT
vs.	)	
DEPARTMENT OF REVENUE, STATE OF COLORADO, JOSEPH F. DOLAN, ALAN CHARNES, ROLAND J. BRUMBAUGH, FRANK L. BECKWITH, T. V. MIDDLE, JR., JAMES DAVIS, E. L. POST, JERRY D. MARTIN, ROD SIMMONS and C. F. JEFFERS,	)	
Defendants.	)	

Motions for Summary Judgment filed by both Plaintiffs and the Defendants came on for hearing on June 15, 1979; Plaintiff Ricky A. Manka not appearing; Plaintiffs Jerry L. Manka and Barbara R. Manka appeared pro se, and Defendants appeared by Carol M. Welch of Yegge, Hall & Evans, and the Court having reviewed each file, the motions and supporting briefs, and considered the arguments of counsel, would find and conclude as follows:

1. The above five cases were filed between the period August 17, 1976 and September 9, 1976, and were assigned to various divisions of this Court. They all arise or result from efforts on the part of the Department of Revenue to collect sales, use and income taxes alleged to be due from the above mentioned Plaintiffs individually and under the business names of Central Cycle Shoppe and Track & Wheel Equipment Co. In four of the actions, Jerry L. Manka and Barbara R. Manka (herein designated Plaintiffs unless otherwise indicated) are the sole Plaintiffs; in Civil Action No. 95554, Ricky Alan Manka joined with them as a party Plaintiff. On motion of the Defendants, all cases were ordered consolidated into 95403 by Judge Joseph Cannon and were set for trial on March 27, 1978. Thereafter and on motion of Plaintiffs, Judge Cannon disqualified himself, and all five cases were assigned to this division.

2. A short summary of Plaintiffs' claim for relief in each case would be helpful in resolving the issues raised by the subject motions. Such summary identified by case number and the original division to which it was assigned is as follows:

No. 95403 (Div. 9 — Judge Cannon) Plaintiffs seek a refund of approximately $1,014.23 from monies paid to the Department of Revenue to secure the release of their property seized under the distraint warrants. They assert that $8,135.98 has already been returned, but the above amount is still owing as well as damages for its wrongful detention.

No. 95470 (Div. 1 — Judge Calvert) Plaintiffs seek actual damages of $1,824.00 as well as punitive damages alleged to have been sustained on or about April 19, 1976, after Defendants seized and held their 1967 Chevrolet Nova Coupe; they assert that while the automobile was in their custody, Defendants failed to properly care for same, and as a result, various parts were removed by unknown parties to Plaintiffs' damages as aforesaid. This action appears to be based on an initial unlawful seizure and later negligence.

No. 95490 (Div. 4 — Judge Rhodes) Plaintiffs sought damages against Joseph F. Dolan, Director of the Department of Revenue, and various other agents of the Depart-

ment, including C. F. Jeffers, alleged to be a result of a fraudulent and unlawful audit performed by Jeffers. The Director and various other Defendants were joined on the theory that they "acted on" the unlawful audit of Jeffers; Judge William Rhodes prior to the consolidation of the cases dismissed all Defendants in the matter, except Jeffers, the latter being retained under the theory that the Amended Complaint might state a claim for tortuous interference with Plaintiffs' business.

No. 95491 (Div. 10 — Judge Baker) Plaintiffs seek actual damages in the amount of $12.00 as well as specified punitive damages they allege was the result of an unlawful seizure of their 1967 Chevrolet El Camino pickup while parked on a public street. In argument, Plaintiffs state that the distraint order was "not directed toward it." On Defendants' motion, the State of Colorado was dismissed, but the individual Defendants were retained by Judge Baker in December, 1977. Defendants had asserted the doctrine of res judicata by reason of an earlier case filed in Division 8, but Judge Baker ruled that such case had different parties and the doctrine would not apply.

No. 95554 (Div. 10 — Judge Baker) All three Plaintiffs seek damages for unlawful seizure of a 1973 Dodge truck and the businesses located at 2844 Delta Drive. They allege that the distraint warrants issued in the names of Jerry L. Manka and Barbara R. Manka individually and as Central Cycle Shoppe and distraint warrants issued in the name of Ricky A. Manka, Track & Wheel Equipment Co. were all served on Plaintiff Jerry L. Manka on April 19, 1976; that none were served on Ricky A. Manka.

3. In all cases, Plaintiffs allege "Jurisdiction is conferred by the 1973 Revised Statutes and Title 42 of the U.S. Code, Section 1983, 1985, 1986 and 28 U.S.C. 1331-2680."

4. In regard to a possible claim under federal law, it is noted that Plaintiffs allege in later pleadings that cases numbered 95490, 95491 and 95554 involve only the issue of "whether the seizure was lawful or unlawful under the 4th Amendment."

5. Plaintiffs' Motion for Summary Judgment is directed to all cases, except 95403. As to the remaining four, they assert that Defendants are liable as a matter of law for damages, both actual and punitive, from the time of the initial wrongful audit by Jeffers (No. 95490), which the other Defendants acted on, through the unlawful seizure of their car, trucks and businesses. In regard to the distraint warrants, they argue that no one can seize property without a court order; that prior to issuance, a distraint warrant must describe the specific property to be seized, and, even if valid, the warrants were not properly served.

6. Defendants' Motion for Summary Judgment requests dismissal of Action Nos. 95490, 95491 and 95554. In addition, they request that any claim for damages in cases numbered 95403 and 95470 be limited to actual out-of-pocket losses. As grounds for same, Defendants allege that Plaintiffs' claims for damages are barred as a matter of law for reasons asserted in their brief, including qualified immunity, res judicata and collateral estoppel. In support of the latter two doctrines, they cite Civil Action No. 92349 filed by these Plaintiffs in Division 8 (Judge Donald Campbell) on April 23, 1976, following seizure of their property pursuant to distraint warrants; they further allege that Plaintiffs sought in the Division 8 case an injunction to prevent further seizure of any property, for an order requiring the named Defendants to grant Plaintiffs a hearing pursuant to the provisions of 39-21-103 (2) and to require the Defendants to release property already seized.

7. This Court will take judicial notice of Civil Action No. 92349 in considering its effect from the standpoint of res judicata and collateral estoppel on the instant cases. A review of this file discloses that Plaintiffs while represented by counsel did file a suit against Joseph F. Dolan, Director of the Colorado Department of Revenue, and Jerry Martin as a Department of Revenue collection and enforcement officer, requesting the relief described in the preceding paragraph; that as grounds for such relief, Plaintiffs alleged in their Complaint that one C. F. Jeffers conducted an audit of their books, which audit was arbitrary, capricious and without basis in fact; the Complaint further alleged that following the audit, Plaintiffs received Notices of Deficiency, at which point they made a timely request for an administrative hearing to review the correctness of any claimed deficiency, which request was

denied in violation of their Constitutional rights. The Complaint also contains an allegation that between April 19, 1976 through April 22, 1976, pursuant to distraint warrants issued by Defendant Joseph F. Dolan, Defendant Jerry Martin seized personal property of Plaintiffs valued at $31,115.00, which included the assets of Track & Wheel Equipment Co., "a partnership owned by Plaintiff." At the request of Plaintiffs and based on their allegation of unlawful tax assessment, Judge Campbell, on April 23, 1976, entered an order temporarily restraining the Defendants from seizing any further property of Plaintiffs or selling any property then under distraint until a hearing could be conducted. The file discloses that following such hearing, Judge Campbell entered an order on May 19, 1976, wherein he expressly found that following receipt of the Notices of Deficiency, Plaintiffs had not requested a hearing "pursuant to the requirements of C.R.S. 1973, 39-21-103 (2)(3)." He concluded by denying Plaintiffs' request for relief in the nature of mandamus and for permanent injunction. The temporary restraining order was also dissolved. No Motion for Rehearing or for New Trial was filed as required by the Civil Rules, nor was any appeal taken, and the above order of May 19, 1976 thus became final. On May 22, 2979, Plaintiffs filed a lengthy Petition, requesting that the case be reopened and that the Court entertain a Motion for a New Trial, which request was denied on June 6, 1979.

8. That the following is readily apparent: That the instant case for damages against C. F. Jeffers (95490) is based on his alleged wrongful audit, which audit was also the basis of Plaintiffs' claim against Jeffers's superior, Joseph F.. Dolan, Director, in the Division 8 case (Campbell); that all but one of the distraint warrants involved in the alleged unlawful seizures in the instant cases were issued prior to the filing of the Division 8 case. The remaining warrant was issued after the temporary restraining order was dissolved.

9. That Plaintiffs' Motion for Summary Judgment should be denied for the reason hereinafter stated.

10. In determining whether Defendants are entitled to Summary Judgment as well as Partial Summary Judgment, it would be well to look to prior case law that deals with similar issues. In *Leibhart vs. Revenue Department*, 123 Col., 369, 229

P.2d, 655, the taxpayer also alleged numerous alleged irregularities on the part of the Department of Revenue prior to the final determination of tax. As in the instant case, the taxpayer, upon receipt of the Notices of Deficiency, made no request for an administrative hearing, nor was an appeal made to the District Court following a final determination. On page 656 of the Pacific Reporter, the Supreme Court states:

> "Under the statute, the director's decision became final 30 days after notice thereof was mailed to the taxpayer, and it thereupon became no longer subject to judicial review."

On the following page, the Court states:

> "The statute affords the taxpayer a plain, speedy and adequate remedy and full opportunity to be heard as to the quantum of the tax and the alleged irregularities leading up to the fixation of tax liability. Failure to interpose the objections now made in the manner and at the time prescribed by law, and to exhaust the statutory remedies afforded the taxpayer, constitutes a waiver of such objections which cannot now be asserted."

Leibhart clearly establishes that if the taxpayer fails to request an administrative hearing or a later court review, the director's decision becomes final. Judge Campbell, of course, decided that no request was made, and the next question to be resolved is whether such ruling back in 1976 would now bar Plaintiffs under the doctrine of res judicata from proceeding against the present Defendants for any alleged wrongful acts from the time of Jeffers's audit through the seizure of all property.

11. It is a general rule of law that a former judgment may be pleaded as a bar by and only by the parties to the action and their privies. As previously mentioned, in Civil Action No. 92349, only Joseph F. Dolan, Director, and Jerry Martin were named as Defendants. The instant cases name these same two individuals as well as Alan Charnes, the present Director, and various other agents and employees of the Department of Revenue.

A search of the law reveals there are certain exceptions to the rule that the parties or their privies must be the same. In 50 C.J.S., 277, Section 756, Judgments, and in discussing res judicata, appears the following:

> " . . . .that privity and mutuality are not necessary where the liability of the defendant asserting the plea is dependent on, or derived from, the liability of one who was exonerated in an earlier suit brought by the same plaintiff on the same facts and it has been recognized that the courts have seized on slight evidence of relationship or privity on which to base a mutual estoppel."

In the section following the above, entitled "Persons Connected in Interest or Liability" appears the following:

> "Principal and agent. A judgment for plaintiff in an action against a principal may be taken advantage of by the agent as a bar to an action against him for the same cause."

> "Master and servant. While a person injured by the tort of a servant may bring suit against either the master or servant, a recovery against the master has been held a bar against the servant . . . . . and where plaintiff in an action against an employee is defeated on the merits, the judgment is generally regarded as a bar to a subsequent action against the employer, *and vice versa* . . . . ." (emphasis added)

See also 46 Am Jur 2d, 731, Section 570.

12. Another rule of law that is applicable to this situation is noted under the same heading in C.J.S. at page 102.

> "All other essential elements being present, a judgment operates as a bar, not only as to every matter adjudicated, but as to every other matter which might with propriety have been determined in that same action."

The above appears to be the rule in Colorado. See *Pomeroy vs. Waitkus*, 517 P2d., 396.

There also appears to be substantial law to the effect that a governmental body and its officers, boards, commissions, agents and representatives form but a single entity with respect to application of the rule of res judicata; that under this theory, exoneration of the superior would also relieve the agent, even though not named in the original suit. See 50 C.J.S. 335, Section 796.

13. In the Division 8 case, it is apparent that Jeffers's alleged tortuous act, a wrongful audit, is the basis of Plaintiffs' cause of action against his superior, Joseph F. Dolan, the Director. Under the authority cited above, the Court would conclude that the mere adding of additional agents of the Department of Revenue as Defendants or the request for damages as opposed to injunction and mandamus would not prevent former Civil Action No. 92349 from operating as a bar under the doctrine of res judicata to all claims for relief in the instant cases from the time of the audit through the seizure of all property by virtue of the distraint warrants. The addition of Ricky Manka as a party Plaintiff in No. 95554 would not change the above result. As shown by the pleadings, Jerry Manka and Barbara Manka owned all of the assets of the two businesses, namely Central Cycle Shoppe and Wheel & Track Equipment Co. Ricky Manka, as holder of the sales tax license in the latter business would be, at most, a nominal Plaintiff.

14. The doctrine of res judicata as aforesaid would bar all relief requested in Case Nos. 95490, 95491 and 95554, and Summary Judgment should be granted to Defendants accordingly; further, that in Case No. 95403 it would appear that any recovery should be limited to the amount of the refund, if any, as may be established by competent testimony, plus any interest or other relief that may be expressly provided by statute; further, that in Case No. 95470, any recovery would be limited to market value of any parts at the time of removal while the 1967 Chevrolet Nova Coupe was being distrained by the Department of Revenue, plus interest.

15. In regard to the denial of Plaintiffs' Motion for Summary Judgment, the following conclusions are pertinent: A distraint warrant as authorized under 39-21-114, as amended, unlike a criminal search warrant, is directed to any and all property of the taxpayer that may be located and is

issued by the Executive Director of the Department of Revenue, as opposed to the Court. There is no statutory requirement that the undersigned has been able to locate that all property be seized at one time or on one day or that only one sale be conducted so long as the necessary time elapses between notification to the owner and the publication of the notice. Here no sale ever took place, and any other irregularities are moot.

16. That in regard to Plaintiffs' right to relief under the U.S. Constitution or any federal statute by virtue of the seizure of their property, this Court would conclude that such seizures were lawful since Plaintiffs failed to avail themselves of the administrative and court remedies provided by the laws of this State prior to the issuance of the distraint warrants.

17. The Court notes that this case is set for trial to a jury on August 14, 1979, at 9:30 a.m. If the parties are still unable to resolve the remaining issues as delineated above, such trial will stand.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That Plaintiffs' Motion for Summary Judgment be denied for the reasons stated above.

2. That Defendants' Motion for Summary Judgment be granted as to cases numbered 95490, 95491 and 95554; that Partial Summary Judgment be granted as to cases numbered 95403 and 95470 to the extent above outlined.

DONE in Chambers this 31st day of July, 1979.

HUNTER D. HARDEMAN
District Judge

FILED
JAN 5 1981
MICHAEL RODAK, JR., CLERK

No. 80-820
IN THE
SUPREME COURT OF THE UNITED STATES
November Term

JERRY L. MANKA, BARBARA R. MANKA, and RICKY A. MANKA,

Petitioners,

vs.

JERRY D. MARTIN, RODNEY SIMMONS, RICHARD HEWITT, E.L. POST, T.V. MIDDLE, C.F. JEFFERS, L.C. HOEFFER, FRANK T. BECKWITH, ROLAND J. BRUMBAUGH, ALAN CHARNES, and JOSEPH F. DOLAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAROL M. WELCH
of HALL & EVANS
2900 Energy Center
717 - 17th Street
Denver, Colorado 80202
(303) 573-5022
COUNSEL OF RECORD

Billy Shuman
Assistant Attorney General
Office of the Attorney General
State of Colorado
1525 Sherman Street
Third Floor
Denver, Colorado 80203
(303) 839-3611

TABLE OF CONTENTS

	PAGE
CITATIONS TO OPINIONS	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
A. DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS	7
B. FAILURE TO FOLLOW STATUTORY PROVISIONS	10
C. RIGHTS TO JUDICIAL REVIEW	11
D. DIFFERING TREATMENT OF PRO SE PLAINTIFFS	13
CONCLUSION	13
APPENDIX A	15
APPENDIX B	16

TABLE OF AUTHORITIES

TABLE OF CASES CITED	PAGE
Edwards v. Elliott, 21 Wall. 532 (1874)	12
French v. Taylor, 199 U.S. 274 (1905)	11
G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).	8
Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).	12
Government of Canal Zone v. Sierra, 594 F.2d 60 (5th Cir. 1979)	9
Jones v. Estate of Lambourn, 159 Colo. 246, 411 P.2d 11 (1966)	12
Mazique v. Mazique, 356 F.2d 801 (D.C. Cir. 1966)	13
Parklane Hosiery Co., Inc. v. Shore, ____ U.S. ____, 99 S.Ct. 645 (1979).	11
Phillips v. Commissioner, 283 U.S. 589 (1931)	9
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	9
United States v. Miller, 589 F.2d 1117 (1st Cir. 1978).	9

TABLE OF STATUTES AND OTHER AUTHORITIES CITED

United States Constitution, Amendment IV	6, 8, 9, 14
United States Constitution, Amendment VII	12
28 U.S.C. § 1257	10
Colo. Rev. Stat. Ann. §§ 39-21-101, et seq. (1973)	1
Colo. Rev. Stat. Ann. § 39-21-103 (1973)	3, 9
Colo. Rev. Stat. Ann. § 39-21-105 (1973)	4
Colo. Rev. Stat. Ann. § 39-21-105(4) (1973)	9
Colo. Rev. Stat. Ann. § 39-21-114 (1973)	4

CITATIONS TO OPINIONS AND JUDGMENTS BELOW.

Appended to this Brief as Appendix "A" is a copy of the trial court's order of May 19, 1976 in Civil Action No. 92349, filed in the District Court in and for the County of El Paso, State of Colorado. This decision was the basis for the trial court's and Colorado Supreme Court's application of the doctrine of *res judicata*. (See Appendices A and B Petition for Writ of Certiorari.)

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ETC.

The procedures for assessment and collection of taxes due and appeal of final determinations of taxes due are found in Colo. Rev. Stat. Ann. §§ 39-21-101, *et seq.* (1973). Because of the length of the statutory provisions, a verbatim recitation of the provisions will be found in Appendix "B" attached hereto.

STATEMENT OF THE CASE

As a result of the petitioners' filing of an income tax return in 1973 in which they claimed a refund of substantially all taxes deducted and paid to the state of Colorado during the course of that year, a pattern which they had observed over the course of several years, the computer selected the Mankas' tax return for audit, in accordance with its programming. In the course of that audit, Charles Jeffers, the Colorado Department of Revenue employee to whom the audit was assigned, discovered what he considered to be internal inconsistencies in the bookkeeping procedures observed by the petitioners herein, penciled entries, and other items which led him to question the accuracy of the records he was examining. As a result of the Mankas' uncooperative attitude, Mr. Jeffers resorted to an estimating process which involved a projection of gross profits and total sales based upon the available records. This process is authorized by the rules and regulations of the Colorado Department of Revenue.

On the basis of Mr. Jeffers' audit, it was determined that the Mankas owed the State of Colorado additional income, consumer use, and sales taxes. Notices of deficiency were sent to the Mankas but were returned by them with an accompanying cover letter claiming that the calculations were "ridiculously unrealistic". The notices of deficiency which were sent to the Mankas advised them of the procedures which would be necessary in order to appeal the audit.

Briefly summarized, those procedures allowed the Mankas, upon receipt of the notice of deficiency, thirty days within which to request a hearing, setting forth the reasons for same and the amount of the requested changes, or, at their election, to file a written brief and other documents requesting that the deficiency be reconsidered without a hearing. Based upon the evidence presented, the Executive Director of the Department of Revenue then would be charged with the duty of making a final determination and notifying the taxpayer of same by certified mail along with a notice and demand for payment. (See Colo. Rev. Stat. Ann. § 39-21-103 (1973), Appendix "B" hereof). When no request for hearing nor briefs were

PREVIOUS PAGE WAS BLANK

received, the Executive Director issued a final determination of taxes due in the same amounts as those contained in the notices of deficiency. These notices of final determination, mailed to the Mankas as required, also advised them of their right to appeal the final determination to the district court and of the method by which such an appeal could be taken. (For the statutory provisions in question, see Colo. Rev. Stat. Ann. § 39-21-105 (1973), Appendix "B".) Apart from returning the "ridiculoulsy unrealistic" notices of deficiency, the Mankas took no action to effect any of the above-described appellate rights.

When the time limits for filing such an appeal passed without the appeal having been filed, the Colorado Department of Revenue commenced collection procedures against the Mankas. These collection procedures included issuance and service of warrants of distraint on Jerry L. Manka and, a few days thereafter, the Department's taking possession of the Mankas' business for purposes of sale of its assets to satisfy the unpaid taxes, pursuant to the provisions of Colo. Rev. Stat. Ann. § 39-21-114 (1973). Execution of the warrants was delayed to enable Mr. Manka and his tax advisor to consult with the Director of the Department of Revenue. When that consultation did not resolve the issue, the agents returned to the Mankas' business to execute the warrants. Mr. Manka was present when the agents of the Department of Revenue arrived to take possesson of the business. He allowed them entry into the building, assisted with the inventory of the property, and at no time registered any objection to the enforcement procedure. Although a warrant of distraint had been issued authorizing seizure of property located at the Mankas' residence to satisfy unpaid income tax liability, the agents did not ever gain entry to their home nor was any property located there ever seized, actually or constructively.

Following seizure of the business, the Mankas filed a civil action in the District Court in and for the County of El Paso, State of Colorado, against the Department of Revenue. The Complaint sought relief in the nature of

mandamus requiring the Executive Director of the Colorado Department of Revenue to grant the plaintiffs a hearing and issuance of an injunction prohibiting sale of the plaintiffs' property prior to the hearing. Although the trial court initially entered an ex parte order prohibiting sale of the property, that preliminary restraining order was vacated and the prayer for relief in the nature of mandamus and for a permanent injunction was denied on May 19, 1976, based upon the trial court's determination that the plaintiffs did not timely comply with the statutory prerequisites for taking an administrative appeal. (See Order attached hereto as Appendix "A".)

After the preliminary injunction was vacated and prior to the sale of the property seized, the Mankas tendered to the Colorado Department of Revenue the total amount of back taxes, penalty, and interest which was found to be due and owing as a result of Mr. Jeffers' audit and filed their claim for refund. A second audit was done in response to the claim for refund, as a result of which all but $1,014.23 of the monies paid by the Mankas to the Department of Revenue was refunded to them. The petitioners herein then filed five separate actions, pro se, in the District Court in and for the County of El Paso naming various agents or employees of the Colorado Department of Revenue as defendants. (A summary of the five complaints can be found on page 9, Appendix "A", and pages 18-19, Appendix "B", Petition for Writ of Certiorari.) These cases were ultimately consolidated into a single civil action.

Shortly prior to trial of the consolidated action, all parties filed Motions for Summary Judgment. At a hearing held on these Motions on June 15, 1979, the trial court granted summary judgment in favor of the defendants as to all claims for relief in three of the five cases and entered its order granting partial summary judgment and limiting the recoverable damages in the remaining two cases to the plaintiffs' "actual out-of-pocket losses". (See Appendix "B", Page 20, Petition for Writ of Certiorari.) At the conclusion of the trial in August 1979, the jury returned a verdict in favor of the defendants in one of the two remaining cases and in favor of the plaintiffs in the amount

of $535.62 in the case in which they sought refund of the $1,014.23 which had not been returned to them after the processing of their claim for refund.

In accordance with the Colorado Appellate Rules, the Mankas did timely file a notice of appeal from the summary judgment order entered by the trial court in June of 1979 dismissing all claims for relief in three of the cases. They did not, however, file a Motion for New Trial or a Motion to Alter or Amend the Judgment after the return of the jury's verdicts in the two civil actions which were not totally resolved by the trial court's Summary Judgment Order. Accordingly, the Colorado Supreme Court concluded that the Mankas were barred from pursuing any appeal relating to those two actions. (See Appendix "A", page **12**, Petition for Writ of Certiorari.) Additionally, after reviewing the Complaints and the record below, the Colorado Supreme Court determined that the Mankas had not raised any issue as to the constitutionality of any of the Colorado statutes concerning the assessment or collection of taxes until their case was lodged with the Colorado appellate court system. The court therefore declined to consider any claim of unconstitutionality of these statutes (Appendix "A", pp. 10-11, Petition for Writ of Certiorari) and limited its decision on appeal to the propriety of the trial court's granting of complete summary judgment in three of the cases filed by the plaintiffs/petitioners herein, action which the Colorado Supreme Court affirmed.

SUMMARY OF ARGUMENT

The petitioners were not deprived of property without due process of law; due process does not require, under these circumstances, a specific identification or description of each item of property subject to seizure prior to seizure. Mr. Mankas' allowing the agents to enter his business and assisting in the inventory constitutes consent, thereby eliminating the warrant requirement of the Fourth Amendment.

The State's alleged failure to follow statutory provisions is not an issue properly within the Court's jurisdiction.

The petitioners were accorded all rights to judicial review to which they were entitled; they enjoyed no constitutional right to a jury trial.

The petitioners were not treated any differently than lawyers admitted to practice in the State of Colorado; furthermore, the petitioners as pro se litigants have no constitutionally protected right either to the same or different treatment than that accorded to members of the bar.

ARGUMENT

A. DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

Because of the apparent lack of relationship between the "Questions Presented For Review" on page 2 of the Petition for Writ of Certiorari and the "Reasons for Granting the Writ" on pages 5 through 7 of the Petition, undersigned counsel is uncertain of the exact nature of the issues which the petitioners propose to raise in the proceedings before this Court if their Petition is granted. The allegations concerning alleged denial of due process of law appear to be three-fold. In that portion of the Petition entitled "Questions Presented for Review", the petitioners are alleging they were deprived of their property without due process of law because the property which was seized for payment of taxes was not specifically identified or described on the warrants for distraint and, apparently, because there was "No Court Order, or oath or affirmations [sic]" supporting the issuance of the warrants for distraint. On the other hand, in that portion of the Petition entitled "Reasons for Granting the Writ", the petitioners allege that their business, including the inventory and the building in which it was conducted, was seized without a warrant. (See Page 5, Petition for Writ of Certiorari.) Finally, again in the section entitled "Reasons for Granting the Writ", the petitioners allege that their due process rights have been violated because they were forced to pay the disputed back taxes, interest and penalty in order to secure release of the property which had been seized (allegedly without a warrant or court order) and prevent its sale.

To the extent the petitioners herein are alleging a deprivation of property without due process of law by virtue of the seizure of their property without a warrant, the allegations are misleading and ignore the consent issue. As noted on Page 19 of Appendix "B", Petition for Writ of Certiorari, in the trial court's summary of the plaintiffs' claims for relief in each of the five cases they filed, the petitioners themselves have previously alleged service of the distraint warrants on Jerry L. Manka on April 19, 1976. There can be no question but that such warrants authorized *seizure* of the property. *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977). The real issue is whether the agents of the Department of Revenue were required to obtain a *search* warrant.

Respondents contend that the Fourth Amendment's warrant requirement is inapplicable to this case because (a) certain of the property seized was on a public right-of-way, and (b) Mr. Manka consented to the search of his business.

The Colorado Supreme Court noted in its decision (Page 14, Appendix "B", Petition for Writ of Certiorari) that one item of property seized by the Colorado Department of Revenue pursuant to the warrants of distraint was a pickup truck parked on the public streets. As this Court has already determined, the seizure of an automobile from the public streets is not violative of the United States Constitution even if no warrants had been issued. *G.M. Leasing Corp. v. United States, supra.*

Apart from the vehicle on the public streets, the only other property seized by Department of Revenue agents was property located on the premises of the petitioners' business. That business had already been determined to be in default on payment of taxes, and the warrants of distraint authorized seizure and sale of so much of its property as necessary to satisfy the unpaid taxes, penalty, interest, and costs of execution. Unlike the Internal Revenue agents in *G.M. Leasing Corp., supra,* the Department of Revenue agents were not *searching* for the taxpayers' property; they were *seizing* all of it. That difference excepts this case from the holding in *G.M.*

Leasing Corp., supra, that a search warrant, meeting the requirements of the Fourth Amendment, was required.

Even assuming the applicability of the Fourth Amendment's warrant requirement to seizure of the entire business, Mr. Manka's actions when the agents came to seize the business constituted consent to the search, thereby nullifying that requirement. By personally allowing the agents access to his business for what he understood was seizure of its contents and by assisting them in compiling the inventory of the property so seized, Mr. Manka tacitly, if not expressly, consented to entry on his property. See *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *Government of Canal Zone v. Sierra,* 594 F.2d 60 (5th Cir. 1979); *United States v. Miller,* 589 F.2d 1117, 1131 (1st Cir. 1978), *cert. denied* ____ U.S. ____, 99 S.Ct. 1499 (1979).

Finally, insofar as the petitioners are complaining about being forced to pay "ransom" in order to secure the return of their property, the respondents would note that a similar procedure (payment or seizure of property to enforce payment of a tax liability prior to judicial proceedings to determine liability) is authorized in the federal statutes and that such a procedure has been held not to violate the taxpayer's right to due process of law. *Phillips v. Commissioner*, 283 U.S. 589 (1931).

Furthermore, such a "requirement" resulted here from the Mankas' refusal to initiate the internal review processes available to them. Colo. Rev. Stat. Ann. § 39-21-103 (1973) allows the taxpayer to challenge the amount of deficiency claimed to be due and owing without prior payment of that deficiency. The earliest that any taxpayer is required to pay disputed taxes is in conjunction with the taking of an appeal from the final determination of the Executive Director of the Department of Revenue. Within 15 days of the filing of the notice of appeal, the taxpayer must either file "a bond in twice the amount of the taxes, interests, and other charges stated in the final determination...[or] deposit the disputed amount with the executive director of the department of revenue...." Colo. Rev. Stat. Ann. § 39-21-105(4) (1973). Hence, had the petitioners exercised their

statutory right to a review by the executive director, it must be assumed, based upon the action taken by the Department of Revenue in response to petitioners' claim for refund, that the notices of deficiency would have been modified to result in a significantly lower claimed deficiency and the petitioners could thus have avoided payment of a substantial portion of the "ransom money" which they were required to pay to prevent sale of their property as a result of their failure to exercise these appellate rights. Accordingly, respondents suggest that it was not the Colorado Department of Revenue that initially placed the petitioners in the position of having to pay money which they claimed was not due in order to secure release of the property which had been seized; rather, it was the petitioners' own inactivity and failure to initiate the statutory review processes which left them with the payment of monies claimed to be due as their only option.

B. FAILURE TO FOLLOW STATUTORY PROVISIONS

In their Petition for Writ of Certiorari, the petitioners invoked the jurisdiction of this Court as granted in 28 U.S.C. § 1257. That statute empowers this Court to issue a Writ of Certiorari

> [w]here the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution...of the United States, or where any title, right, privelege or immunity is specially set up or claimed under the Constitution...of...the United States.

The second "Question[] Presented for Review" in the Petition for Writ of Certiorari raises, at most, a factual question which has already been resolved contrary to the petitioners' position in the courts below. The question does not address itself to the issue of whether the statutory procedures authorizing seizure of the petitioners' property are repugnant to the United States Constitution; rather, it raises factual questions about the respondents' compliance with that statutory procedure. As such, this question is outside the jurisdiction of this Court. Where the question is one of compliance with state statutes, not the unconstitutionality of such statutes, the case does not

present a federal question. *French v. Taylor*, 199 U.S. 274, (1905).

C. RIGHTS TO JUDICIAL REVIEW

The petitioners have not identified in their Petition the constitutional source of their claimed right to "judicial review" ("Questions Presented for Review") or to have "all the facts heard by a jury" ("Reasons for Granting the Writ"). The petitioners are apparently contending that their right to judicial review and/or a jury trial was denied when the trial court herein entered summary judgment in favor of the respondents after application of the doctrine of *res judicata*.

Assuming the existence of constitutional protection of a right to judicial review or, under the circumstances of this case, a right to a jury trial (assumptions which are not warranted in this case), such rights must necessarily be deemed conditional ones, subject to the traditional legal principles concerning the finality of judgments and the conduct and termination of litigation. Thus, as this Court has recently held, even in those cases in which litigants might otherwise enjoy a constitutionally protected right to trial by jury, application of legal principles such as the doctrine of collateral estoppel to bar further litigation of issues once decided does not violate the Seventh Amendment guarantee. *Parklane Hosiery Co., Inc., v. Shore*, ____U.S.____, 99 S.Ct. 645 (1979).

After reviewing the circumstances giving rise to the filing of the petitioners' original lawsuit (in which they attempted to enjoin further seizure of their property and the sale of property previously seized) and the dismissal of that action, both the trial court and the Colorado Supreme Court determined that in two of the five cases, application of the doctrine of *res judicata* was appropriate. As can be seen from an examination of Appendices "A" and "B", Petition for Writ of Certiorari, application of the doctrine was not arbitrary or capricious but followed a careful review of the factual basis for the earlier action (Civil Action No. 92349) as compared to the factual bases raised in the five lawsuits which give rise to this Petition. The fact of

primary significance is the trial court's finding in Civil Action No. 92349 (Appendix "A" hereof) that these petitioners received notice of the deficiency, of the appellate procedures available to them, and of the methods by which these appellate procedures could be exercised yet failed to avail themselves of the review processes set out in the statute. Having been accorded these various opportunities to challenge the amount of tax claimed to be due and owing and having failed to exercise those appellate rights, the petitioners herein were held to be barred from further litigation, the central focus of which was necessarily the accuracy of the initial audit. It was not application of the doctrine of *res judicata* which denied these petitioners any right to judicial review; it was their own failure to respond in the statutorily prescribed manner which resulted in that denial.

The petitioners do not identify the source of their claimed right to a jury trial, nor do they cite authority in support of such a claim. Under the circumstances of this case, that right is in fact non-existent. It has long been established that the provisions of Amendment VII of the United States Constitution do not apply to state court proceedings. *Edwards v. Elliott,* 21 Wall. 532 (1874). There are no other federal statutes or constitutional provisions which guarantee petitioners a right to a jury trial in this action.

Although the Colorado Constitution does preserve a right of trial by jury in criminal cases, no such corresponding right is extended to civil trials. The Colorado appellate courts have repeatedly held that the right to a jury trial in a civil case exists only when set forth by statute or rule of court. A jury trial in a civil case is not a matter of right under the Colorado Constitution. See, e.g., *Jones v. Estate of Lambourn,* 159 Colo. 246, 411 P.2d 11 (1966); *Gibson v. Angros,* 30 Colo. App. 95, 491 P.2d 87 (1971). Clearly, interpretation and application of Colorado's Constitution and statutes do not present federal questions.

D. DIFFERING TREATMENT OF PRO SE PLAINTIFFS

Again, petitioners have failed to identify the source of their claimed constitutional right to equality of treatment as between pro se plaintiffs and recognized members of the bar. Respondents are aware of no constitutional provision or federal statutory provision recognizing any such right. Furthermore, in this case the petitioners' real complaint would appear to be the *denial* of special treatment because of their pro se status. In the Colorado Supreme Court's opinion, (Appendix "A", Petition for Writ of Certiorari) the Court reinforced a prior ruling that pro se litigants are to be held to the "'same rules of *** procedure as is required of those qualified to practice law before our courts....'" (Page 15, Appendix "A", Petition for Writ of Certiorari.) This same rule has been applied to pro se litigants in the federal court system. *Mazique v. Mazique*, 356 F.2d 801 (D.C. Cir.), *cert. denied*, 384 U.S. 981 (1966). There is no factual basis for asserting that they were treated differently from recognized members of the bar.

Respondents are unaware of any constitutional right of pro se litigants to be treated in the same fashion as recognized members of the bar. Furthermore, the petitioners have failed to identify how they were treated differently by the Colorado Supreme Court, thus violating their claimed rights. The final "Question[] Presented for Review" presents no issue within the jurisdiction of this Court.

CONCLUSION

The issues which the petitioners propose to raise before this Court are not, with the exception of the allegations concerning deprivation of property without due process of law, properly within the jurisdiction of the Court. Certain of the rights which they claim have been violated are not in fact rights which are recognized by the Constitution or statutes of the United States. To the extent petitioners seek to relitigate factual issues concerning compliance with state law, such issues are outside the jurisdiction of the Court.

To the extent the Petition for Writ of Certiorari seeks review of the alleged deprivation of petitioners' property without due process of law, the Petition should be denied because it fails to identify even colorable claims of such a deprivation. The petitioners were accorded numerous opportunities for hearings to determine the amount of taxes due and owing; it was only after they repeatedly failed to avail themselves of the opportunities that the enforcement procedures which resulted in the seizure of their property were initiated. Because no search was required prior to seizure of their property, or, alternatively, because Mr. Manka consented to any such search, the petitioners' Fourth Amendment rights were not violated.

WHEREFORE, respondents respectfully request this Honorable Court to enter its Order denying the Petition for Writ of Certiorari.

Dated this 30th day of December, 1980.

Respectfully submitted,

Carol M. Welch #8008
of HALL & EVANS
2900 Energy Center
717 - 17th Street
Denver, Colorado 80202
(303) 573-5022
COUNSEL OF RECORD

Billy Shuman
Assistant Attorney General
Office of the Attorney General
State of Colorado
1525 Sherman Street
Third Floor
Denver, Colorado 80203
(303) 839-3611

Appendix A

IN THE DISTRICT COURT WITHIN AND FOR THE COUNTY OF EL PASO AND STATE OF COLORADO

Civil Action No. 92349

Jerry R. [sic] Manka and Barbara L. [sic] Manka, Plaintiffs, V. COLORADO DEPARTMENT OF REVENUE, Defendant.	)	ORDER

This matter comes on for ruling upon the petition of the Plaintiffs for relief in the nature of mandamus requiring the director of the Colorado Department of Revenue to grant Plaintiffs a hearing pursuant to CRS 1973 39-21-103(2) and (3), and for an injunction prohibiting sale of Plaintiff's property seized under distraint until such a hearing is held.

Plaintiffs also request the Court to consider various allegations of mistake by the Department of Revenue in computing the deficiencies assessed to them. Because the administrative appeal procedure has not been followed, these allegations may not be considered by the Court at this time.

The sole question to be decided by the Court in its decision upon the Plaintiff's claim for relief is whether or not their letter of February 14, 1976, constitutes a request for hearing pursuant to the requirements of CRS 1973, 39-21-103(2) and (3).

The letter states, in general terms, their dissatisfaction with the computations of the Department of Revenue, and returned the notices of deficiency "unacknowledged". These notices contained explicit instructions on the procedure necessary to secure an administrative hearing.

Both by statute, CRS 1973, 39-21-103(2) and those instructions, the taxpayer must request a hearing. There is nothing in the Plaintiff's letter of February 14, 1976, which can even be construed as such a request. If a citizen elects to react to such notices with defiance and anger, they must also accept the consequences of such action. The Court does not find the Plaintiffs to have complied with the statutory requirements to appeal an assessment of the Department of Revenue.

Therefore, Be It Ordered, that the Plaintiff's Petition for relief in the nature of mandamus and for permanent injunction denied. They [sic] preliminary restraining order previously issued is hereby vacated.

Done this 19th day of May, 1976.

_____

Donald E. Campbell, Judge

Appendix B

39-21-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Taxpayer" includes a person against whom a deficiency is being asserted, whether or not he has paid any of the tax in issue prior thereto.

39-21-102. Scope. Unless otherwise indicated, the provisions of this article apply to income, gross ton-mile, passenger-mile, motor and special fuel, cigarette, sales, and use taxes imposed by articles 22 and 26 to 28 of this title and article 3 of title 42, C.R.S. 1973.

39-21-103. Hearings. (1) As soon as practicable after an income, gross ton-mile, passenger-mile, motor fuel, special fuel, cigarette, sales, or use tax return is filed, the executive director of the department of revenue shall examine it and shall determine the correct amount of tax. If

the tax found due is greater than the amount theretofore assessed, a notice of deficiency shall be mailed to the taxpayer by certified mail.

(2) The taxpayer may request a hearing on the proposed tax by application to the executive director within thirty days of the mailing of a notice of deficiency.

(3) The request for hearing shall set forth the taxpayer's reasons for and the amount of the requested changes in the deficiency.

(4) The executive director of the department of revenue shall notify the taxpayer in writing of the time and place for such hearing thirty days prior thereto. In all cases where the disputed deficiency exceeds two hundred dollars and does not involve sales and use taxes, the hearing shall be held in Denver, Colorado. If the disputed deficiency is two hundred dollars or less or involves sales and use taxes, the hearing may be held, at the election of the taxpayer, in the district office of the department of revenue nearest to the place where the taxpayer resides or has his principal place of business within Colorado. If the taxpayer does not reside or have a place of business in Colorado the hearing shall be held in the city and county of Denver.

(5) After a hearing under this section, the taxpayer shall not be entitled to a second hearing before the executive director of the department of revenue on the matters set forth in his previous request for hearing.

(6) The hearing shall be held before the executive director of the department of revenue or, in cases wherein the disputed deficiency is two hundred dollars or less or involves a sales or use tax, before such person within the department of revenue as the executive director shall designate. The said executive director or his delegate is authorized to administer oaths and take testimony. At the hearing, the taxpayer may assert any facts, make any arguments, and file any briefs and affidavits he believes pertinent to his cause.

(7) In lieu of the request for hearing within the time provided by this section the taxpayer may, at his election, file a written brief and such other written materials or documents as he deems appropriate and request that the

executive director of the department of revenue reconsider the deficiency without a hearing. The executive director shall reconsider the deficiency in the same manner as if the written material submitted had been presented at a hearing pursuant to this section. The submission of written material shall be considered for all purposes the same as a request for and submission of the material at a hearing.

(8) Based on the evidence presented at such hearing or filed in support of the taxpayer's contentions or after the expiration of thirty days from the mailing of the notice of deficiency, if no request for hearing or brief has been filed by the taxpayer, the executive director of the department of revenue shall make a final determination within a reasonable time and shall send the taxpayer a notice of final determination by certified mail accompanied by notice and demand for payment. The executive director may modify the tax, penalty, and interest questioned at the hearing and may approve a refund; except that no additional tax shall be assessed for less than one dollar. Unless an appeal is taken as provided in section 39-21-105, the tax, together with interest thereon and penalties, if any, shall be paid withing thirty days after mailing of the notice and demand for payment by the executive director.

39-21-104. Rejection of claims. Upon rejection, in whole or in part, of a claim for refund filed by a taxpayer, the executive director of the department of revenue shall send a notice of rejection to the taxpayer in writing by certified mail; and within thirty days from the mailing thereof, the taxpayer may request a hearing or file a brief with the executive director, except where the claim is for refund of a deficiency in taxes assessed after hearing or determination on written brief had under the provisions of section 39-21-103. Thereafter, both the taxpayer and the executive director shall proceed as provided in section 39-21-103 with respect to the hearing or determination on written brief. Upon reaching a decision upon such claim for refund after hearing had thereon or consideration of the written brief, the executive director shall send to the taxpayer, by certified mail, notice of final determination of claim for

refund, stating therein the grounds for allowance or rejection in whole or in part. This section shall not prevent a taxpayer from suing for a refund in the district court within the time provided by law whether or not he requests a hearing or presents a written brief.

30-21-105. Appeals. (1) The taxpayer may appeal the final determination of the executive director of the department of revenue issued pursuant to section 39-21-103 or 39-21-104 within thirty days of the mailing of such determination.

(2) (a) Venue shall be in the district court of the county wherein the taxpayer resides or has his principal place of business. If the taxpayer has neither a residence nor a principal place of business within the state, venue shall be in the district court in and for the city and county of Denver.

(b) Jurisdiction to hear and determine appeals is conferred upon the district courts of this state. Trial may be had or any order made in term or in vacation. The district court shall try the case de novo, reviewing all questions of law and fact, such review being conducted in accordance with the Colorado rules of civil procedure. The taxpayer shall present his case in the same manner as the plaintiff in other civil actions and the normal rules of evidence shall apply. The taxpayer shall have the burden of proof with respect to the issues raised in the notice of appeal except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. The burden of proof shall be upon the executive director of the department of revenue or his delegate to show that a petitioner is liable as a transferee of property of a taxpayer but not to show that the taxpayer was liable for the tax. The district court may affirm, modify, or reverse the determination of the executive director and may enter judgment on its findings.

(3) Appeal to the district court shall be taken by filing, with the clerk of the district court of the proper county, a copy of the notice of final determination received by the taxpayer, together with a written notice stating that the taxpayer appeals to the district court and alleging the pertinent facts upon which such appeal is grounded.

(4) Within fifteen days after filing of the notice of appeal, the taxpayer shall file with the district court a bond in twice the amount of the taxes, interests, and other charges stated in the final determination by the executive director which are contested on appeal; but the taxpayer may at his option deposit the disputed amount with the executive director of the department of revenue in lieu of posting bond. If such amount is so deposited, no further interest shall acrue on the deficiency contested during the pendency of the action. At the conclusion of the action, after appeal to the supreme court or the court of appeals or after the time for such appeal has expired, the funds deposited shall be, at the direction of the court, either retained by the executive director and applied against the deficiency or returned in whole or in part to the taxpayer with iterest at one-half percent per month. No claim for refund of amounts deposited with the executive director of the department of revenue need be made by the taxpayer in order for such amounts to be repaid in accordance with the direction of the court.

(5) Upon filing of the notice of appeal, the executive director of the department of revenue shall be deemed to be a party to such appeal; and the clerk of the district court shall docket the cause as a civil action. The appellant shall cause summons to be issued and cause the same to be served upon the executive director, in accordance with the manner provided by law in civil cases. Notice of the date of trial shall be mailed to the taxpayer and to the executive director, at least twenty days prior thereto.

(6) The final decision made in such appeal shall be entered as a judgment, as in other civil cases, against the taxpayer or against the executive director as the case may be.

(7) The decision of the district court shall be reviewable by the supreme court or the court of appeals as is otherwise provided by law.

39-21-106. Compromise. (1) The executive director of the department of revenue or his delegate may compromise any civil or criminal case arising under the

Colorado income, gross ton-mile, passenger-mile, motor and special fuel, cigarette, sales and use tax imposed by articles 22 and 26 to 28 of this title and article 3 of title 42, C.R.S. 1973, prior to reference to the Colorado department of law for prosecution or defense; and the attorney general or his delegate shall, upon the written direction of the executive director, compromise any such case after reference to the department of law for prosecution or defense.

(2) Whenever a compromise of two thousand five hundred dollars or more is made by the executive director or his delegate in any case, there shall be placed on file in the office of the executive director or his delegate the opinion of the director with his reasons therefor, which may include financial inability of the taxpayer to pay a greater amount, with a statement of:

(a) The amount of tax assessed;

(b) The amount of interest, additional amount, addition to the tax, or assessable penalty imposed by law on the person against whom the tax is assessed; and

(c) The amount paid in accordance with the terms of the compromise.

(3) Notwithstanding the provisions of subsection (2), no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed, including any interest, additional amount, addition to the tax, or assessable penalty, is less than two thousand five hundred dollars.

39-21-107. Limitations. (1) Except as provided in this section, and unless such time is extended by waiver, the amount of any gross ton-mile, passenger-mile, motor fuel, special fuel, cigarette, sales, and use tax and the penalty and interest applicable thereto shall be assessed within three years after the return was filed, whether or not such return was filed on or after the date prescribed, and no assessment shall be made or credit taken and no notice of lien shall be filed, nor distraint warrant issued, nor suit for collection instituted, nor any other action to collect the same commenced after the expiration of such period. No

lien shall continue after the three-year period provided for in this subsection (1), except for taxes assessed before the expiration of such period, notice of lien with respect to which has been filed prior to the expiration of such period, in which case the lien shall continue only for one year after the expiration of such period. This subsection (1) shall not apply to income tax.

(2) In the case of income tax imposed by article 22 of this title, unless such time is extended by waiver and except as provided in section 39-22-601 (6) (e), the assessment of tax, penalties, and interest shall be made within one year after the expiration of the time provided for assessing a deficiency in federal income tax or changing reported federal taxable income of a partnership or fiduciary, including any extensions of such period by agreement between the taxpayer and the federal taxing authorities. An assessment of income taxes having been made according to law shall be good and valid and collection thereof may be enforced at any time within six years from the date of said assessment.

(3) For purposes of this section, a tax return filed before the last day prescribed by law or by regulation promulgated pursuant to law for the filing thereof shall be considered as filed on such last day.

(4) In the case of failure to file a return or the filing of a false or fraudulent return with intent to evade tax, the tax may be assessed and collected at any time.

(5) Where, before the expiration of the time prescribed in this section for the assessment of tax, both the executive director of the department of revenue or his delegate and the taxpayer have consented in writing to an assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(6) Nothing in this section shall be construed to limit any right accrued or revive any liability barred by any statute enacted on or before July 1, 1965.

39-21-108. Refunds. (1) (a) In the case of income tax imposed by article 22 of this title, the taxpayer must file any claim for refund or credit for any year not later than one year after the expiration of the time provided for filing a claim for refund of federal income tax, including any extensions of such period by agreement between the taxpayer and the federal taxing authorities; but nothing in this subsection (1) shall be construed to shorten the period for filing claims provided by section 39-22-601 (6) (f). In the case of ton-mile or passenger-mile tax imposed by article 3 of title 42, C.R.S. 1973, the taxpayer must file any claim for refund or credit for any period not later than three years after the date of payment. Claims for refund of other taxes covered by this article shall be made within the time limits expressly provided for the specific taxes involved. No suit for refund may be commenced before the expiration of six months from the date of filing the claim for refund required under this section unless the executive director of the department of revenue renders a decision thereon within that time, nor after the expiration of two years from the date of mailing, by certified or registered mail, by the executive director to the taxpayer of a notice of disallowance of the part of the claim to which the suit relates. The two-year period described above shall be extended for such period as may be agreed upon in writing between the taxpayer and the executive director. This subsection (1) shall not apply to sales and use taxes.

(b) This subsection (1) shall apply to all claims for refunds filed after July 1, 1971.

(2) If the executive director discovers from the examination of a return within the time periods provided for the filing of refunds, or upon claim duly filed by the taxpayer, or upon final judgment of a court that the tax, penalty or interest paid by any taxpayer is in excess of the amount due, or has been illegally or erroneously collected, then the executive director shall issue in favor of the taxpayer his voucher to the controller for the refund of such illegally collected tax, penalty, or interest, regardless of whether or not such sum was paid under protest, together

with interest provided in section 39-21-110. Upon receipt of such voucher properly executed and endorsed, the controller shall issue his warrant for the payment to the taxpayer out of the reserve provided therefor; but the controller shall keep in his files a duplicate of said voucher and also a statement which shall set forth the reason why such refund has been ordered.

(3) Whenever it is established that any taxpayer has, for any period open under the statutes, overpaid a tax covered by articles 22 and 26 to 28 of this title, and article 3 of title 42, C.R.S. 1973, and that there is an unpaid balance of tax and interest accrued, according to the records of the executive director, owing by such taxpayer for any other period, so much of the overpayment of tax plus interest allowable thereon as does not exceed the amount of such unpaid balance shall be credited thereto and any excess of the overpayment shall be refunded.

39-21-109. Interest on underpayment, nonpayment, or extensions of time for payment on tax. (1) If any amount of income, gross ton-mile, passenger-mile, motor fuel, special fuel, cigarette, sales, or use tax is not paid on or before the last date prescribed for payment, interest on such amount at the rate of six percent per annum shall be paid for the period from such last date to the date paid. The last date prescribed for payment shall be determined without regard to any extension of time for payment and shall be determined without regard to any notice and demand for payment issued, by reason of jeopardy, prior to the last date otherwise prescribed for such payment. In the case of taxes in which the last date for payment is not otherwise prescribed, the last date for payment shall be deemed to be the date the liability for tax arises, and in no event shall it be later than the date notice and demand for the tax is made by the executive director of the department of revenue or his delegate.

(2) Interest prescribed under this section shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as the tax to which it is applicable.

(3). If any portion of a tax is satisfied by credit of an

overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowed with respect to such overpayment.

(4) Interest prescribed under this section on any tax may be assessed and collected at any time during the period within which the tax to which such interest relates may be assessed and collected.

(5) This section shall not apply to any failure to pay estimated Colorado income tax.

39-21-110. Interest on overpayments. (1) Interest shall be allowed and paid upon any overpayment in respect to any income, gross ton-mile, passenger-mile, motor fuel, special fuel, sales, or use tax at the rate of six percent per annum. Such interest shall be allowed and paid as follows:

(a) In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken;

(b) In the case of a refund, from the date of the overpayment to a date, to be determined by the executive director of the department of revenue or his delegate, preceding the date of the refund by not more than thirty days, whether or not such refund is accepted by the taxpayer after tender of such refund to the taxpayer. The acceptance of such refund shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(2) Any portion of an income, gross ton-mile, passenger-mile, motor fuel, special fuel, cigarette, sales, or use tax or any interest, assessable penalty, additional amount, or addition to a tax which has been erroneously refunded shall bear interest at the rate of six percent per annum from the date of the payment of the refund.

(3) If any overpayment of income, gross ton-mile, passenger-mile, motor fuel, special fuel, sales, or use tax is refunded within ninety days after the last date prescribed for filing the return of such tax, determined without regard to any extension of time for filing the return, no interest

shall be allowed under subsection (1) of this section on such overpayment.

(4) If the amount of any income tax is reduced by reason of a carryback of a net operating loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the last day of the taxable year in which the net operating loss arises. If any overpayment of income tax results from a carry-back of a net operating loss, such overpayment shall be deemed not to have been made prior to the close of the taxable year in which such net operating loss arises.

39-21-111. Jeopardy assessment and demands. (1) If the executive director of the department of revenue finds that collection of the tax will be jeopardized by delay, in his discretion, he may declare the taxable period immediately terminated, determine the tax, and issue notice and demand for payment thereof; and, having done so, the tax shall be due and payable forthwith, and the executive director may proceed immediately to collect such tax as provided in section 39-21-114.

(2) In any other case wherein it appears that the revenue is in jeopardy, the executive director of the department of revenue may immediately issue demand for payment; and, regardless of the provisions of sections 39-21-103 and 39-21-105, the tax shall be due and payable forthwith and, in his discretion, the executive director may proceed immediately to collect said tax as provided in section 39-21-114.

(3) Collection under either subsection (1) or (2) of this section may be stayed if the taxpayer gives such security for payment as shall be satisfactory to the executive director.

39-21-112. Duties and powers of executive director. (1) It is the duty of the executive director of the department of revenue to administer the provisions of this article, and he has the power to adopt, amend, or rescind such rules and regulations not inconsistent with the provisions of this article and articles 22 and 26 to 28 of this title, and article 3 of title 42, C.R.S. 1973, and, subject to other provisions of

law relating to the promulgation of regulations, to appoint, pursuant to section 13 of article XII of the state constitution, such persons, to make such expenditures, to require such reports, to make such investigations, and to take such other action as he deems necessary or suitable to that end. The executive director shall determine his own organization and methods of procedure in accordance with the provisions of this article. For the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of the tax due from any taxpayer, the executive director has power to examine or cause to be examined by any employee, agent, or representative designated by him for that purpose any books, papers, records, or memoranda bearing upon the matters required to be included in the return.

(2) If any taxpayer refuses voluntarily to furnish any of the foregoing information when requested by the executive director of the department of revenue or his employee, agent, or representative, the executive director, by subpoena issued under his hand, may require the attendance of the taxpayer and the production by him of any of the foregoing information in his possession and may administer an oath to him and take his testimony. If the taxpayer fails or refuses to respond to said subpoena and give testimony, the executive director may apply to any judge of the district court of the state of Colorado for an attachment against such taxpayer as for contempt and said judge may cause arrest of such person, and upon hearing, said judge has, for the purpose of enforcing obedience to the requirements of said subpoena, power to make such order as, in his discretion, he deems consistent with the law for punishment of contempts.

(3) If the executive director of the department of revenue is unable to secure from the taxpayer information relating to the correctness of the taxpayer's return or the amount of the income of the taxpayer, the executive director may apply to any judge of the district court of the state of Colorado for the issuance of subpoenas to such other persons as the executive director believes may have

knowledge in the premises, and upon making a showing satisfactory to the court that the taxpayer cannot be found, or evades service of subpoena, or fails or refuses to produce his records or give testimony, or is unable to furnish such records or testimony, the judge has power, after service of summons upon the persons named in the petition of the executive director and after hearing, to cause the issuance of subpoenas under the seal of the court to the persons sought to be so summoned requiring any of them to appear before said executive director and give testimony relating to said taxpayer's return or income. In case any of said persons so served with subpoena fail to respond thereto, the judge may proceed against such persons as in cases of contempt.

(4) Regulations adopted, amended, or rescinded by the executive director of the department of revenue shall be effective in the manner and at the time prescribed by the executive director, subject to the provisions of article 4 of title 24, C.R.S. 1973.

(5) Subject to the provisions of this article and the state personnel system regulations, the executive director of the department of revenue is authorized to appoint and prescribe the duties and powers of such officers, accountants, experts, and other persons as may be necessary in the performance of his duty. He may delegate to any such person so appointed such power as he deems reasonable and proper for the effective administration of this article and shall bond, in a sufficient amount, any person handling money under this article.

(6) Members of the department of revenue shall each give bond to the state of Colorado in the sum of five thousand dollars conditioned upon the faithful performance of their duties under the provisions of this article.

39-21-113. Reports and returns. (1) (a) It is the duty of every person, firm, or corporation liable to the state of Colorado for any tax imposed on gross ton-mile, passenger-mile, motor fuel, special fuel, cigarette, sales, and use taxes to keep and preserve for a period of three

years such books, accounts, and records as may be necessary to determine the amount of such tax liability.

(b) It is the duty of every person, firm, or corporation liable to the state of Colorado for any tax imposed on income or a report in connection therewith to keep and preserve for a period of four years following the due date of the return or the payment of said tax such books, accounts, and records as may be necessary to determine the amount of such tax liability.

(c) All such books, accounts, and records shall be open for examination at any time by the executive director of the department of revenue or his duly authorized agents.

(2) In the case of a person, firm, or corporation which does not keep the necessary books, accounts, and records within the state, it shall be sufficient if such person, firm, or corporation produces within this state such books, accounts, records, or such information as shall be reasonably required by the executive director of the department of revenue for examination by him or, an agent duly authorized by him or, in lieu thereof, if said books, accounts, and records are open for inspection by an agent authorized by the executive director at the place where such books, accounts, and records are kept.

(3) All reports and returns of taxes received by the department, other than income tax returns, covered by this article shall be preserved for three years and thereafter until the executive director of the department of revenue orders them to be destroyed. Income tax returns received by the department of revenue shall be preserved for four years and thereafter until the executive director orders them to be destroyed.

(4) (a) Except in accordance with judicial order or as otherwise provided by law, the executive director of the department of revenue, his agents, clerks, and employees shall not divulge or make known in any way any information disclosed in any document, report, or return filed in connection with any of the taxes covered by this article. The officials charged with the custody of documents, reports, and returns shall not be required to

produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the executive director in an action or proceeding under the provisions of any such taxing statutes to which the department of revenue is a party or on behalf of any party to any action or proceeding under the provisions of such taxing statutes when the report of facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said reports or of the facts shown thereby, as are pertinent to the action or proceeding, and no more.

(b) Nothing in this section shall be construed to prohibit the delivery to a person or his duly authorized representative of a copy of any return or report filed in connection with his tax. Such copies may be certified by the executive director of the department of revenue or his deputy or agent and when so certified shall be evidence equally with and in like manner as the originals and may be received by the courts of this state as evidence of the contents of the originals.

(c) It is unlawful for any members of the department of revenue, any deputy, agent, clerk, or other officer or employee engaged in any administration which is governed by this article to engage in the business or profession of tax accounting or to accept employment, with or without consideration, from any person, firm, or corporation for the purpose, directly or indirectly, of preparing tax returns or reports required by the laws of the state of Colorado, by any other state, or by the United States government or to accept any employment for the purpose of advising, preparing material or data, or the auditing of books or records to be used in an effort to defeat or cancel any tax or part thereof that has been assessed by the state of Colorado, any other state, or by the United States government.

(5) Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns

and the items thereof, or the inspection of returns by the attorney general or other legal representatives of the state. Nothing in this section shall be construed to prohibit the release of information for the periodic publication of gasoline gallonage reports based on reports and returns filed under the motor fuel tax or special fuel tax statutes and containing summaries of the quantities of liquid fuel marketed in Colorado, specifying the suppliers, distributors, and consumers of such motor fuel or special fuel, and other information relating to motor fuel tax or special fuel tax.

(6) Except as provided in subsections (5) and (7) of this section, any person who violates any provision of subsection (4) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, and if the offender is an officer or employee of the state, he shall be dismissed from office.

(7) Notwithstanding the provisions of this section, the executive director of the department of revenue shall supply any county assessor of the state of Colorado or his representative with information relating to ad valorem tax assessments or valuation of property within his county and, in his discretion, may permit the commissioner of internal revenue of the United States, or the proper official of any state imposing a similar tax, or the authorized representative of either to inspect the reports and returns of taxes covered by this article.

39-21-114. Methods of enforcing collection. (1) The executive director of the department of revenue may issue a warrant under his own hand directed to any employee, agent, or representative of the department of revenue, sometimes in this section referred to collectively as "agent", commanding him to distrain, seize, and sell the personal property of the taxpayer, except such personal property as is exempted from execution and sale by any statute of this state, for the payment of the tax due together with penalties and interest accrued thereon and cost of execution:

(a) When any deficiency in tax is not paid within thirty days from the mailing of notice and final determination therefor and no appeal from such deficiency has been docketed with any district court of this state within said period; or

(b) When any other amount of tax, penalty, or interest is not paid within ten days from the mailing of demand for payment thereof; or

(c) Immediately upon making of a jeopardy assessment or of the issuance of a demand for payment, as provided in section 39-21-111.

(2) (a) The agent charged with the collection shall make or cause to be made an account of the goods or effects distrained, a copy of which, signed by the agent making such distraint, shall be left with the owner or possessor, or at his usual place of abode with some member of his family over the age of eighteen years, or at his usual place of business with his stenographer, bookkeeper, or chief clerk, or if the taxpayer is a corporation, shall be left with any officer, manager, general agent, or agent for process, with a note of the sum demanded and the time and place of sale; and shall forthwith cause to be published a notice of the time and place of sale, together with a description of the property to be sold, in some newspaper of general circulation within the county wherein distraint is made or, in lieu thereof and in the discretion of the executive director of the department of revenue, the agent shall cause such notice to be publicly posted at the courthouse of the county wherein such distraint is made, copies thereof to be posted in at least two other public places within said county. The time fixed for the sale shall not be less than ten days nor more than sixty days from the date of such notification to the owner or possessor of the property and the publication or posting of such notices. Said sale may be adjourned from time to time by said agent if he deems it advisable but not for a time to exceed in all ninety days from the date first fixed for the sale. When any personal property is advertised for sale under distraint as aforesaid, the agent making seizure shall

proceed to sell such property at public auction, offering the same at not less than a fair minimum price, including the expenses of making the seizure and of advertising the sale, and if the amount bid for the property at the sale is not equal to the fair minimum price so fixed, the agent conducting the sale may declare the same to be purchased by him for the state. The property so purchased may be sold by the agent under such regulations as may be prescribed by the executive director. In any case of distraint for the payment of taxes, the goods, chattels, or effects so distrained shall be restored to the owner or possessor if, prior to the sale, the amount due is paid together with the fees and other charges or may be redeemed by any person holding a chattel paper or other evidence of right of possession.

(b) In all cases of sale, the agent making the sale shall issue a certificate of sale to each purchaser, and such certificate shall be prima facie evidence of the right of the agent to make such sale and conclusive evidence of the regularity of his proceedings in making the sale and shall transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold; and where such property consists of certificates of stock in the possession of the agent, the certificate of sale shall be notice, when received, to any corporation, company, or association of said transfer, and said certificate of such sale shall be authority for such corporation, company, or association to record the transfer on its books and records; and where the subject of sale is securities or other evidences of debt in the possession of the agent, the certificate of sale shall be good and valid evidence of title in the person holding the same, as against any other person. Any surplus remaining above the taxes, penalties, interest, costs, and expenses of making the seizure and of advertising the sale, shall be returned to the owner, or such other person having a legal right thereto, and, on demand, the executive director of the department of revenue shall render an account in writing of the sale.

(3) The agent of the executive director of the department of revenue to whom a warrant has been issued may file with the clerk of any district court within this state a

copy of said warrant, and thereupon the clerk shall enter in the judgment docket, in appropriate columns, the name of the taxpayer mentioned in the warrant, the amount of the tax, or a portion thereof, together with interest and penalties for which the warrant is issued, and the date upon which such copy is filed and shall issue and deliver a transcript of such judgment to the agent without cost. Said transcript so issued and delivered may be filed with the clerk and recorder of any county and from the time of such filing such judgment shall become a lien upon all the real property of the judgment debtor in such county owned by him at the time, or which he may afterwards acquire until said lien expires. The lien shall continue for six years from the entry of the judgment unless the judgment is previously satisfied, all in the same manner as is provided by statute for making a judgment of a court of record a lien on real property. The judgment so entered shall have the same force and effect as other judgments of a court of record, and execution upon the real and personal property of the judgment debtor and redemption thereof may be had as provided by law with respect to other judgments. The executive director and his agent may cause execution to be had thereon by the proper sheriff or other officer, and such sheriff or other officer shall be entitled to the same fees for his services to be collected in the same manner as in the case of other executions.

(4) Any employee, agent, or representative of the executive director of the department of revenue to whom warrant has been issued may file a notice of lien in such form as the executive director may prescribe with the person in possession of any personal property or rights to property belonging to the taxpayer, and the filing of such notice of lien shall operate as a lien upon such personal property or rights to property from the date of such filing. Any costs incurred by the person in possession of such property or rights to property by reason of compliance with said notice of lien shall be paid by the executive director and recovered by him out of any proceeds of sale of the property subject thereto. The executive director may release said lien as to any part or all of the property or rights

to property or rights to property covered by any such lien upon such terms as he may deem proper.

(5) Nothing in this section shall be construed to abrogate or diminish the rights of bona fide purchasers, lienors, or pledgees for value and without notice.

(6) The executive director of the department of revenue may be made a party defendant in an action at law or a suit in equity by any person aggrieved by the unlawful seizure or sale of his personal property, but only the state of Colorado shall be responsible for any final money judgment secured against said executive director; and said judgment, so secured, shall be paid or satisfied out of the "tax refund" provided by secion 39-21-108(2) upon presentation by the judgment creditor to the executive director of two certified copies of said final judgment.

(7) If any person, firm, or corporation liable for the payment of any tax covered by this article has repeatedly failed, neglected, or refused to pay the same within the time specified for such payment and the department of revenue has been required to exercise its enforcement proceedings three or more times by the issuance of a distraint warrant to enforce collection of any taxes due from such taxpayer, the executive director of the department of revenue is authorized to assess and collect the amount of such taxes due, together with all interest and penalties thereon provided by law and also an additional amount equal to fifteen percent of the delinquent taxes, interest, and penalties due or the sum of twenty-five dollars, whichever amount is greater, said additional amount being imposed to compensate the department for administrative and collection costs incurred in collecting such delinquent taxes.

39-21-115. Reciprocity with other states for collection of taxes provided. (1) Any state of the United States or any political subdivision thereof has the right to sue in the courts of the state of Colorado to recover any lawfully imposed taxes which may be owing it, whether or not the taxes have been reduced to judgment, when the like right is accorded to the state of Colorado and its political

subdivisions by that state through statutory authority or granted as a matter of comity. The appropriate officials of such other states are authorized to bring action in the courts of this state for the collection of such taxes. The certificate of the secretary of state of such other state that such officials have the authority to collect the taxes to be collected by such action shall be the conclusive proof of authority.

(2) The attorney general or an appropriate official of any political subdivision of the state of Colorado may bring suit in the courts of other states to collect taxes legally due this state or any political subdivision thereof.

(3) "Taxes" as used in this section includes:

(a) Any tax assessments lawfully made, whether they are based upon a return or other disclosure of the taxpayer, or upon the information and belief of the taxing authority, or otherwise;

(b) Any penalties lawfully imposed pursuant to a taxing statute; and

(c) Interest charges lawfully added to the tax liability which constitutes the subject of the action.

39-21-116. Closing agreements. (1) For the purpose of facilitating the settlement and distribution of estates, trusts, receiverships, other fiduciary relationships, and corporations in the process of dissolution or which have been dissolved, the executive director of the department of revenue may agree with the fiduciary or surviving directors upon the amount of taxes due from the decedent, or from the decedent's estate, the trust, receivership, or other fiduciary relationship or corporation, for any of his or its taxable periods, under the provisions of the taxes covered by this article, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact, payment in accordance with such agreement shall be full satisfaction of the taxes for the taxable periods to which the agreement relates.

(2) Except as provided in subsection (4) of this section, any personal representative of a decedent or of the estate of a decedent, or any trustee, receiver, or other

person acting in a fiduciary capacity, or any director of a corporation in the process of dissolution or which has been dissolved who distributes the estate or fund in his control without having first paid any taxes covered by this article due from such decedent, decedent's estate, trust estate, fund, or corporation shall be personally liable to the extent of the property so distributed for any unpaid taxes of the decedent, decedent's estate, trust estate, receivership, or corporation covered by this article which may be assessed within the time limited by section 39-21-107.

(3) The distributee of a decedent's estate or of a trust estate or fund or the stockholder of any dissolved corporation who receives any of the property of such decedent's estate, trust estate, fund, or corporation shall be liable, to the extent of the property so received for any unpaid income tax of the decedent, decedent's estate, trust estate, fund, or corporation covered by this article which may be assessed within the time limited by section 39-21-107. Notice to such distributee or stockholder shall be given in the same manner and within the time limit which would have been applicable had there been no distribution.

(4) (a) In case a tax covered by this article is due from a decedent, or from his estate, or by a corporation, in order for personal liability under subsection (2) of this section to remain in effect, determination of the tax due shall be made and notice and demand therefor shall issue within eighteen months after written request for such determination, filed after the filing of the decedent's final return or filed after the filing of the return of the decedent's estate with respect to which such request is applicable, by any personal representative of such decedent or by the corporation, filed after the filing of its return; but a request under this provision shall not extend the period of limitation otherwise applicable.

(b) This subsection (4) shall not apply in the case of a corporation unless:

(I) Such request notifies the executive director of the department of revenue that the corporation contemplates dissolution at or before the expiration of such eighteen-month period;

(II) The dissolution is begun in good faith before the expiration of such eighteen-month period; and

(III) The dissolution is completed.

(c) Upon the expiration of said eighteen-month period, without determination being made and notice and demand being issued, the personal representative of the decedent and the directors of the corporation no longer will be liable under the provisions of subsection (2) of this section.

39-21-117. Saving clause. The provisions of section 13-52-108, C.R.S. 1973, shall not apply to methods of enforcing collections provided in this article.